Sin Yee Estate Sdn Bhd (now known as Y & Y Estate Sdn Bhd) v Pentadbiran Tanah Daerah Kinta

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–7 OF 2004(A)
ABDUL MALEK AHMAD PCA, STEVE SHIM CJ (SABAH & SARAWAK) AND SITI NORMA YAAKOB FCJ
9 SEPTEMBER 2005

Land Law — Acquisition of land — Award — Award of Collector of Land Revenue increased by judge — Appeal to increase further — Second Valuation Report by government valuer — Whether restriction in s 214A of National Land Code taken into account — National Land Code 1965 s 214A

Land Law — Acquisition of land — Compensation — Entitlement to damages as stipulated under s 2(c) and (d) of the First Schedule of Land Acquisition Act 1960 — Whether a new issue raised — Whether leave of court must first be obtained — Land Acquisition Act 1960 First Schedule s 2(c) & (d)

Land Law — Acquisition of land — Compensation — Whether severance had occured — Whether remedied — Whether guidelines for additional compensation for severance followed

The appellant's land had been compulsorily acquired for the development of a housing and commercial centre. After an enquiry, the respondent awarded the sum of RM90,000 per hectare for Lot 25459 and RM215,000 per hectare for Lot 56626. Dissatisfied with the said award, the appellant filed its objection under s 38(1) of the Land Acquisition Act 1960. The appellant applied to increase the amounts awarded and the High Court judge ordered that the award on Lot 56626 be maintained and that the award for Lot 25459 be increased from RM90,000 to RM100,000 per hectare. This was the appellant's appeal.

Held, dismissing the appeal:

(1) There was nothing to suggest from the government valuation report that the restriction under s 214A of the National Land Code 1965 was taken into consideration in arriving at the market value of the land. There was also nothing to suggest that there was a reduction of 20% from the actual valuation given on Lot 25459. The court agreed with the conclusion of the learned High Court judge on this issue and found that there was no merit in this argument (see paras 15 and 18).

(2) The appellant, having not pleaded injurious affection, was not entitled to raise a claim for injurious affection at this stage unless leave of the court had been asked for and granted (see paras 21 and 24).

(3) The learned High Court judge had given due consideration to all the conditions, including the location of the land and its surroundings, size, nature and development potential, in rejecting the claim for severance. The court was

satisfied that the learned High Court judge had followed the guidelines usually applied by the courts in determining whether there should be any additional compensation for severance to the appellant in this case (see para 31).

(4.) Unless there were special reasons to the contrary, interest ordinarily should be granted to the claimant under s 48 of the Land Acquisition Act 1960 as a matter of course unless there were some special reasons for disallowing it. However, the delay in this case was not the fault of the respondent and it was agreed that interest should not be allowed in this case (see para 36).

[Bahasa Malaysia summary

Tanah perayu telah diambil sepenuhnya bagi membangunkan satu kawasan perumahan dan pusat komersial. Selepas satu siasatan, responden telah diberi award berjumlah RM90,000 sehektar bagi Lot 25459 dan RM215,000 sehektar bagi Lot 56626. Kerana tidak berpuas hati dengan award tersebut, perayu telah memfailkan bantahannya di bawah s 38(1) Akta Pengambilan Tanah 1960. Perayu memohon untuk menaikkan jumlah award yang diberi dan hakim Mahkamah Tinggi telah memerintahkan supaya award ke atas Lot 56626 dikekalkan dan award bagi Lot 25459 ditambah daripada RM90,000 kepada RM100,000 sehektar. Ini adalah rayuan perayu.

Diputuskan, menolak rayuan tersebut:

(1) Tiada apa-apa yang memberi gambaran daripada laporan penilaian kerajaan bahawa sekatan di bawah s 214A Kanun Tanah Negara (KTN) diambilkira dalam penilaian harga pasaran tanah tersebut. Juga tiada apa-apa yang menggambarkan bahawa terdapatnya pengurangan sebanyak 20% daripada penilaian sebenar ke atas Lot 25459. Mahkamah bersetuju dengan kesimpulan oleh yang arif hakim Mahkamah Tinggi berkenaan isu ini dan mendapati bahawa tiada merit dalam hujahan ini (lihat perenggan 15 dan 18).

(2) Perayu, yang tidak memplidkan gangguan mudarat (injurious affection), tidak berhak untuk menambah tuntutan bagi gangguan mudarat pada peringkat ini melainkan kebenaran daripada mahkamah telah dipohon dan diberikan (lihat perenggan 21 dan 24).

(3) Yang Arif hakim Mahkamah Tinggi telah memberi pertimbangan sewajarnya kepada semua keadaan, termasuk lokasi tanah dan kawasan sekitarnya, saiz, alam semulajadi dan potensi pembangunan, dalam menolak tuntutan bagi 'severance'. Mahkamah berpuas hati bahawa yang arif hakim Mahkamah Tinggi telah mengikuti panduan yang biasanya digunakan oleh mahkamah dalam menentukan sama ada perlunya terdapat pampasan tambahan untuk 'severance' bagi perayu dalam kes ini (lihat perenggan 31).

(4) Mahkamah berpendapat bahawa melainkan terdapat sebab-sebab khusus untuk menyatakan sebaliknya, faedah biasanya perlu diberikan kepada pihak yang menuntut di bawah s 48 Akta Pengambilan Tanah 1960 seperti kebiasaannya kecuali terdapat sebab-sebab khusus untuk tidak membenarkannya. Walau bagaimanapun, kelewatan dalam kes ini bukanlah

salah responden dan ianya telah dipersetujui bahawa faedah tidak patut dibenarkan dalam kes ini (lihat perenggan 36).]

Notes

For cases on award for acquisition of land, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1632–1672.

For cases on compensation for acquisition of land, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1675–1702.

Cases referred to

Bertam Consolidated Rubber Co Ltd v Collector of Land Revenue Province Wellesley [1984] 1 MLJ 164 (refd)

Bertam Consolidated Rubber Co Ltd v Pemungut Hasil Tanah, Seberang Perai Utara, Butterworth [1989] 2 MLJ 178 (refd)

Collector of Land Revenue v Alagappa Chettiar [1971] 1 MLJ 43 (refd)

Damansara Jaya Sdn Bhd v Pemungut Hasil Tanah Petaling [1992] 2 MLJ 660 (refd)

Lim Foo Yong Ltd v The Collector of Land Revenue [1963] MLJ 69 (refd)

Petaling Rubber Estates Ltd v Collector of Land Revenue, Kedah [1989] 3 MLJ 438 (refd)

Siah Brothers Plantation Sdn Bhd v Pentadbir Tanah dan Daerah Kuantan [1993] 2 MLJ 51 (refd)

United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah and other applications [2003] 1 MLJ 465 (refd)

Legislation referred to

Courts of Judicature Act 1964
Land Acquisition Act 1960 ss 38(1), (2), 48, 49, First Schedule s 2(c), (d)
National Land Code 1965 ss 214, 214A
Practice Direction No 11 of 1987 cl 2

Appeal from: Land Reference No 15–7 of 1994 (High Court, Ipoh)

R Rajasingam (R Rajasingam & Co) for the appellant.

Norazmi Mohd Narawi (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Abdul Malek Ahmad PCA (delivering judgment of the court):

[1] The subject lands comprise 96.76 acres of the 205,831 acres of Lot 25459 and 15 acres of the 27,6434 acres of Lot 56626 in the Mukim of Hulu Kinta in the District of Kinta in the State of Perak. The notification of the compulsory acquisition was gazetted on 21 January 1993 and the purpose was for the development of a housing and commercial centre.

[2] Lot 56626 forms part of the appellant and is sited to the immediate east and south of the Jelapang-Chemor main road and the North South Highway near the

Jelapang toll plaza. In respect of Lot 25459, it has been severed into two portions by the existing North-South Highway, that is the stretch between Ipoh to Changkat Jering, and forms part of the appellant.

[3] After an enquiry, the respondent awarded the sum of RM3,701,565 as compensation for Lot 25459 and RM1,249,558.80 for Lot 56626 as contained in Form G dated 19 May 1993. In effect, the appellant was awarded RM90,000 per hectare for Lot 25459 and RM215,000 per hectare for Lot 56626. Dissatisfied with the said award, the appellant subsequently filed its objection under s 38(1) of the Land Acquisition Act 1960 ('the Act'). The grounds of its objection, as stated in Form H, was in relation to the measurements of the subject lands. The appellant further contended that the amount of compensation did not reflect the market value of the subject lands.

[4] The appellant applied to increase the amounts awarded and on 12 December 1995, the learned High Court judge ordered that the award on Lot 56626 be maintained and that the award for Lot 25459 be increased from RM90,000 to RM100,000 per hectare, that there was no serious severance and that interest at 8% be paid if the increased award was not paid within three months after the service of the order. There was no order as to costs and the deposit was refunded.

[5] Being dissatisfied with the said award, the appellant appealed. At the outset, both learned counsel for the appellant and the learned Senior Federal Counsel for the respondent informed the court that they intended to enter a consent judgment that this case be remitted to High Court for a retrial either before the same or before a different High Court judge. As stated by learned counsel for the appellant, this was because the parties felt further evidence needed to be adduced on the question of severance and additional compensation could be likely. We took a short adjournment to discuss the matter and after due deliberation, we rejected the application to enter consent judgment and asked the parties to proceed if they were ready to do so.

[6] Learned counsel for the appellant started off by saying that the question of severance stood unrebutted and the High Court decision should be revised or additional compensation of RM118,000 per hectare be allowed as Lot D had been worthless and the whole lot sterile.

[7] The learned Senior Federal Counsel, speaking from the Bar table, read out a summary of his outline submissions. The surprise came in the form of the objection on the severance issue, citing *Bertam Consolidated Rubber Co Ltd v Collector of Land Revenue Province Wellesley* [1984] 1 MLJ 164 for support as this was after having agreed initially with learned counsel for the appellant that the matter should be remitted back to the High Court before the same or different High Court judge to award additional compensation for severance.

[8] The swift retort from learned counsel for the appellant was that the statement was not from the Bar and that new reports had arrived the previous Friday which the appellant applied to put in. He added that the learned Senior Federal Counsel conceded to the fact that the Perak State Government had not done anything since. The learned Senior Federal Counsel confirmed that but said that he did not agree to the tendering of the new reports. Learned counsel for the appellant pointed out that interest at 8% was due on delayed payment as the respondent had withheld 25% of the award.

[9] Learned counsel for the appellant, in his outline submissions, contended that:

(a) the second valuation report of the government report cannot be admitted as evidence as it is not a reply to the defendant's valuer's valuation report and it is not in compliance with cl 2 of the Practice Direction No 11 of 1987. Accordingly, the purported affidavit of the government valuer and the appellant's valuer would then also be inadmissible. Thus, it is contended that the court must only rely on the appellant's valuation report in arriving at a decision in making any award;

(b) the government valuer in his valuation had in fact taken into consideration the restrictions imposed by s 214A of the National Land Code 1965 ('the NLC') in arriving at the market value of Lot 25459 and thus, suppressed the value by 20%. Accordingly, the appellant contended that 20% should then be added to the market value of Lot 25459 although the learned High Court judge made a conclusion that the appellant's and the respondent's valuers in their respective reports did not consider the restrictions imposed by s 214A of the NLC;

(c) the government valuer in assessing the market value on Lots A, B and C of Lot 25459 had failed to adopt the belting method or do separate valuations for the respective parties to reflect the true market value and thereafter taking the average resulting in Lots B and C having a market value of RM160,000; and

(d) the learned High Court judge had found as a fact that severance had occurred on Lots D and E of Lot 25459 due to the said acquisition and thus the appellant is entitled for a claim for damages.

[10] The approach to be adopted by this court in an appeal under s 49 of the Act is amply set out in the judgment of the Privy Council in *Collector of Land Revenue v Alagappa Chettiar* [1971] 1 MLJ 43 at p 44:

> The appeal to the Federal Court under s 49 of the Land Acquisition Act 1960 is like any other civil appeal, by way of re-hearing. The Federal Court is entitled to review the inferences and conclusions of the High Court and to draw its own inferences and conclusions: *Aik Hoe & Co Ltd v Superintendent of Lands and Surveys, First Division* [1968] 2 MLJ 293. But where the inferences and conclusions of the High Court are based upon findings of primary fact which are dependent upon the credibility of the oral evidence of witnesses whom the trial judge alone has had the advantage of hearing and seeing, and appellate court ought to accept the High Court's findings of primary fact save in very exceptional cases.

[11] On the first issue raised by the appellant that the second government valuer report cannot be admitted as evidence and the purported affidavit of the government valuer and the appellant's valuer would be inadmissible, the learned Senior Federal Counsel submitted that the second government valuation report was prepared for the purpose of the hearing of the land reference before a High Court judge. He added that whilst the first government valuation report was prepared for the purpose of the land inquiry before the respondent, the second government valuation report was prepared in compliance with Practice Direction No 11 of 1987 to rebut the appellant's valuation report.

[12] To support his argument on the contention that 20%% should be added to the market value of Lot 25459, the appellant submitted that the government valuer had in fact taken into consideration the restrictions imposed by s 214A of the NLC in arriving at the market value of Lot 25459 and thus suppressed the value by 20%. The appellant argued that in the valuation report before the respondent, it was stated that 'therefore this land still consists mainly of Estate Land as provided for under s 214 of the NLC' and during cross-examination, the government valuer stated that the valuation for Lot 25459 is based on a big lot (estate lot) and Lot 56626 is not an estate land. Thus, premised on the above circumstances, it was submitted that 20% should be added to the market value of Lot 25459 since sn 214A of the NLC had been taken into consideration.

[13] The appellant drew an analogy from *Petaling Rubber Estates Ltd v Collector of Land Revenue, Kedah* [1989] 3 MLJ 438; *Bertam Consolidated Rubber Co Ltd v Collector of Land Revenue Province Wellesley* and *Bertam Consolidated Rubber Co Ltd v Pemungut Hasil Tanah, Seberang Perai Utara, Butterworth* [1989] 2 MLJ 178. In the 1984 decision, the Federal Court had to consider the question whether the judge in the court below was wrong in taking into account the constraint imposed by s 214A of the NLC when determining the market value. Mohamad Azmi FJ, speaking for the Federal Court, had this to say at p 167:

> 'It is also contended on behalf of the appellants that it was wrong for the learned Judge to take into account the constraint imposed by s 214A of the National Land Code in determining the market value. Section 214A has the effect of prohibiting any transfer, conveyance or disposal in any manner of estate land unless approval is obtained first from the Estate Land Board. The object of this section is to prevent fragmentation of estate land like Bertam Estate without due consideration being given to social and economic consequences to the country. Although the constraint could be removed by application to the Estate Land Board, at the material date the subject land was not free from that legal as opposed to administrative constraint. As such the learned judge was not wrong in law in taking it into consideration. Indeed, in examination-in-chief, Mr Loh testified that in arriving at his valuation he gave 20% deduction for the effect of s 214A of the NLC.

[14] However, the learned Senior Federal Counsel for the respondent submitted that the valuation by the government valuer was prepared without taking into consideration the restrictions under s 214A of the NLC. If s 214A of the NIC were to be taken into consideration, and the Bertam case were to be followed, on the contrary, there should be a reduction of 20% from the value of Lot 25459.

[15] We are also of the view that there is nothing to suggest from the government valuation report that the restriction under s 214A of the NLC was taken into consideration in arriving at the market value of the land. There is also nothing to suggest that there was a reduction of 20% from the actual valuation given on Lot 25459. When this contention was put forward by the appellant before the learned High Court judge, the learned High Court judge in his judgment stated that to his mind, the learned counsel for the appellant misunderstood the Bertam case and tried to mislead the court.

[16] The learned High Court judge further stated in his judgment that both the appellant's and respondent's valuation reports did not take into consideration the

restriction under s 214A of NLC since the land was acquired by the State Government whereby the restrictions under s 214A of the NLC does not apply.

[17] The learned High Court judge also stated that the comparisons submitted by both the appellant's and respondent's valuers for Lot 25459 were transactions which involved estate land where permission under s 214A of the NLC had been granted, otherwise, the estate land cannot be transacted. If 20% were to be applied in the valuation of Lot 25459, according to the Bertam case, there should be a reduction of 20% from the value of the said lot and not an addition of 20% to the said value.

[18] Hence, we agree with the conclusion of the learned High Court judge on this issue and find that there is no merit in this argument.

[19] On the issue of damages to the remaining Lot 25459 and in particular to lots D and E, the appellant contended that it is entitled to damages as stipulated under s 2(c) and (d) of the First Schedule of the Act. However, the learned Senior Federal Counsel argued that both damages should be treated separately.

[20] The said s 2(c) is a matter to be considered in determining any reasonable compensation for any damage likely to be sustained by the person interested at the time of the respondent taking possession of the land by reason of severing such land while the said s 2(d) provides for the damage likely to be sustained by the person by reason of the acquisition injuriously affecting his other property, whether movable or immovable, in any other manner.

[21] On the issue of a claim for injurious affection under the said s 2(d), the learned Senior Federal Counsel raised an objection to this claim as claim for injurious affection was neither pleaded in the appellant's valuation report nor argued during a trial before the learned High Court judge. The learned Senior Federal Counsel contended that since this is a new issue brought before the Federal Court, the appellant is not entitled to raise this issue pursuant to s 38(2) of the Act without leave of court being obtained first.

[22] Section 38(2) of Act provides as follows:

> Every application under subsection (1) shall state fully the grounds on which objection to the award is taken, and at any hearing in court no other grounds shall be given in argument, without leave of the Court.

[23] In *Damansara Jaya Sdn Bhd v Pemungut Hasil Tanah Petaling* [1992] 2 MLJ 660, it was held that an objector is entitled, provided prior leave of the court is obtained, to make a fresh claim or raised a new ground of objection to an award of the Collector in the course of the reference proceedings at the High Court which he had failed to do at the enquiry before the Collector. Harun Hashim SCJ stated at p 2211:

> Such an application for leave will afford the Collector an opportunity to make the necessary inquiries to file an affidavit in reply and where necessary to object to the application. The additional ground should not be made, as was done here, by throwing it at the face of the Court for the first time at the hearing of the reference proper which caught the Collector and the Court by surprise.

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[24] Therefore, we agree that the appellant is not entitled to raise a claim for injurious affection at this stage unless leave of the court had been asked for and granted. Accordingly, the appellant is now left with the issue of the claim for severance.

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[25] In *Lim Foo Yong Ltd v The Collector of Land Revenue* [1963] MLJ 69 (Privy Council), it was held that severance is a question of fact in each case and the onus of proof is on the landowner to prove that they had suffered damage due to severance.

[26] However, we are of the considered opinion that there is no necessity to go C deeper into the issue as to whether severance had occurred in this case since the learned High Court judge had already found that severance had occurred to Lot 25459 due to the acquisition whereby the remaining lot is bigger than the acquired land. Moreover, the learned High Court judge has concluded that severance had been taken into account by the Perak State Development Corporation to whom the land D was given, where an access road will be provided by them to lots B and D despite there being no access road to the remaining portion of the land except through the acquired land.

[27] The issue of the severance on Lot 25459 was never denied by the learned Senior Federal Counsel for the respondent but he argued that the severance had been E remedied by the undertaking of the Perak State Development Corporation to provide access roads to both lots D and E. He argued that the development plan for a commercial complex and housing on the acquired land must be regarded as betterment to the remaining plots by giving some increase on the value of the land as provided under s 2(b) of the First Schedule to the Act.

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[28] To suggest that there is severance on the remaining lot D, the appellant contended that the value of the remainder of lot D is RM25 per hectare after the acquisition. The respondent argued that this is too low and stated that the value of the remainder of lot D should be at par after the acquisition or even higher considering that development taken place in the area.

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[29] We agree with the finding of the learned High Court judge that the damage to the remaining land is at a minimum. The learned High Court judge had considered whether there was damage on account of the severance caused by the acquisition of the land and found that the severance has been remedied.

H **[30]** The issue of severance had been discussed in *Siah Brothers Plantation Sdn Bhd v Pentadbir Tanah dan Daerah Kuantan* [1993] 2 MLJ 51 where it was decided that the damage on the account of severance had been considered minimal when Petronas decided to build three access roads on the acquired land.

[31] Therefore, we are of the view that the learned High Court judge had given due I consideration to all the conditions, including the location of the land and its surroundings, size, nature and development potential, in rejecting the claim for severance. We are satisfied that the learned High Court judge had followed the guidelines usually applied by the courts in determining whether there should be any additional compensation for severance to the appellant in this case.

[32] There was also the additional issue raised by the learned Senior Federal Counsel for the respondent relating to interest if this court were to make any award in favour of the appellant. Section 48 of the Act provides that:

> If the sum which in the opinion of the Court the Land Administrator ought to have awarded as compensation is in excess of the sum which the Land Administrator did award as compensation, the award of the Court may direct that the Land Administrator shall pay late payment charges on such excess at the rate of eight per cent per annum from the date on which the Land Administrator took possession of the land to the date of payment of such excess to the court or to the person interested.

[33] The learned Senior Federal Counsel pointed out that there was an extraordinary delay waiting the outcome of the case of *United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah and other applications* [2003] 1 MLJ 465 which has settled the dispute on the proper court to hear appeal cases on land acquisition matters before and after the establishment of the Court of Appeal on 24 June 1994 and the amendments to the Act and the Courts of Judicature Act 1964.

[34] This case was originally heard and decided before the High Court judge on 12 December 1995 and the appeal was filed in 1996 at the Court of Appeal. Thereafter, after the decision in the *United Malacca Berhad* case, the notice of appeal was re-filed at the Federal Court on 25 June 2004. We heard the appeal on 22 November 2004.

[35] We agree with the argument by the learned Senior Federal Counsel that the delay was beyond the control of the respondent and the calculation of interest will be cumulative in nature, therefore the amount of compensation allowed by this appeal as well as the calculation of the interest from the date the Land Administrator took possession of the land would be a severe double blow to the respondent as well as the government.

[36] We are of the view that unless there are special reasons to the contrary, interest ordinarily should be granted to the claimant under this section as a matter of course unless there are some special reasons for disallowing it. However, the delay in this case is not the fault of the respondent and we agree that interest should not be allowed in this case.

[37] We have duly deliberated on all the issues raised and, being of the opinion that the learned High Court judge had not made any error in his grounds of judgment, hereby dismiss the appeal with costs and order that the deposit be paid out to the respondent to account of his taxed costs.

Appeal dismissed.

Reported by Sally Kee